FILE COPY

Office - Supreme Court,
FILED
APR 3 1950
CHARLES ELMORE CROP
OLE

Nos. 592, 593.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA,
Petitioner,

v.

PEVELY DAIRY COMPANY.

UNITED STATES OF AMERICA,
Petitioner,

v.

ST. LOUIS DAIRY COMPANY.

BRIEF

Of Respondent, Pevely Dairy Company, in Opposition to Issuance of Writ of Certiorari.

WILLIAM H. ALLEN,
408 Olive Street,
St. Louis 2, Missouri,

JAMES A. FINCH,
Cape Girardeau, Missouri,

E. C. HARTMAN,
319 North Fourth Street,
St. Louis 2, Missouri,

Counsel for Respondent,
Pevely Dairy Company.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinions below	1
Jurisdiction of this court	2
Statement of the case	2
Summary of the argument	11
Argument	16
I. The evidence relied upon by the Government, being all circumstantial and all consistent with innocence, is insufficient to support a conviction	16
(1) In holding that the evidence was insufficient to support a conviction, the Court of Appeals stated and applied the settled law as declared by the Federal Courts with respect to the scope of review of a jury's verdict of guilty in a criminal case	16
(2) Testimony of the Government's witnesses, Gee and Wasser, as to meetings between them prior to October 1, 1941, does not support a conviction	23
(3) In view of the evidence as a whole and the stipulated facts, proof of uniform price changes made effective by respondents on or near the same day did not constitute circumstantial evidence such as to support a conviction	30
II. Certiorari does not issue by this Court merely to review the evidence in a case or the inferences to be drawn therefrom	38
III. The Court of Appeals was not influenced by any misconceptions of law anent the effect of the acquittal of the individual defendants or the statute of limitations	38

IV. The Court of Appeals properly condemned as prejudicial error the injection into the case of evidence as to compensation of the Kerckhoff defendants 38

Conclusion 39

Cases Cited.

Blumenthal v. United States (9 Cir.), 158 F. 2d 762, 763 .....12, 17

Cartello v. United States (8 Cir.), 93 F. 2d 412..11, 13, 17, 24

Cement Manufacturing Protective Ass'n v. United States, 268 U. S. 588, 605, 69 L. Ed. 1104, 1111..14, 33, 37

Donovan v. United States, 3 Cir., 54 F. 2d 193, 195.... 17

Estep v. United States (10 Cir.), 140 F. 2d 40, 45...12, 17

General Talking Pictures v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273, 1275.....15, 38

Glasser v. United States, 315 U. S. 60..... 20

Gold v. United States (8 Cir.), 36 F. 2d 16, 32, 33...13, 24

Graceffo v. United States, 3 Cir., 46 F. 2d 852, 853.... 17

Hammond v. United States, 75 U. S. App. D. C. 397, 127 F. 2d 752.....12, 17, 18

Isbell v. United States (8 Cir.), 227 F. 788, 792, 793 .....12, 17, 18, 21

Jacobson v. Hahn (2 Cir.), 88 F. 2d 433.....13, 24, 25, 27

McGuire v. United States, 171 F. 2d 136, 138..... 22

Neal v. United States (8 Cir.), 102 F. 2d 643, 648...12, 17

Nicola v. United States (3 Cir.), 72 F. 2d 780, 786..12, 17

O'Hara v. Lamb Construction Co. (Mo. App.), 197 S. W. 163, 165.....15, 39

P. Pastene & Co. v. Irving National Bank, 249 N. Y. 272, 164 N. E. 49..... 26

Paddock v. United States (9 Cir.), 79 F. 2d 872....12, 17

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 340, 341, 77 L. Ed. 819, 822, 823..... 27

Pierce v. United States, 6 Cir., 115 F. 2d 399, 400.... 18
Scott v. United States (10 Cir.), 145 F. 2d 405, 408.12, 17, 21
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 68 L. Ed. 413..... 15
Union Electric Light & Power Co. v. Snyder Estate, 65 F. 2d 297, 303.....15, 39
Union Pacific Coal Co. v. United States (8 Cir.), 173 F. 737, 740 .....12, 17
United States v. Gasomiser Corp. (D. C. Del.), 7 Federal Rules Decisions 712.....11, 17, 32
United States v. International Harvester Co., 274 U. S. 693, 708, 709, 71 L. Ed. 1302..... 14
United States v. Johnston, 268 U. S. 220, 227, 69 L. Ed. 925, 926 15
United States v. Laffman (3 Cir.), 152 F. 393, 394...12, 17
United States v. Litberg (7 Cir.), 175 F. 2d 20....11, 17, 22
United States v. Manton, 107 F. 2d 834, 839..... 20
United States v. Reginelli (3 Cir.), 133 F. 2d 595.... 21
United States v. Russo (3 Cir.), 123 F. 2d 420, 423 .....12, 17, 18
United States v. Silva (2 Cir.), 131 F. 2d 247, 249...12, 17
United States v. Standard Oil Co. (8 Cir.), 47 F. 2d 288, 316, 317 .....14, 33, 34
United States v. Sugar Institute (D. C. N. Y.), 15 F. Supp. 817, 887..... 14
United States v. Tatcher (3 Cir.), 131 F. 2d 1002, 1003 .....12, 17
United States v. Valenti (2d Cir.), 134 F. 2d 362..... 20
Wesson v. United States (8 Cir.), 172 F. 2d 931.....11, 17
Wiget v. Becker (8 Cir.), 84 F. 2d 706.....13, 24
Winn v. Consolidated Coach Corporation (6 Cir.), 65 F. 2d 256, certiorari denied 291 U. S. 688, 78 L. Ed. 1059 13
Yellow Cab Co. v. Rodgers (3 Cir.), 61 F. 2d 729....13, 24
Yoffe v. United States, 153 F. 2d 570, 572, 573...12, 19, 20

Nos. 592, 593.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

UNITED STATES OF AMERICA,
Petitioner,

v.

PEVELY DAIRY COMPANY.

UNITED STATES OF AMERICA,
Petitioner,

v.

ST. LOUIS DAIRY COMPANY.

BRIEF

Of Respondent, Pevely Dairy Company, in Opposition to Issuance of Writ of Certiorari.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in the case entitled Pevely Dairy Company v. United States, and St. Louis Dairy Company v. United States, is reported in 178 F. 2d, p. 363. It also appears on pp. 650 to 662 of the record. The opinion of the District Court on defendants' motions to dismiss the indictment is reported in 77 F. Supp. at page 553, and its opinion on motion of each respondent for judgment of acquittal or a new trial is reported in 79 F. Supp. at page 12.

JURISDICTION OF THIS COURT.

In filing its petition for a writ of certiorari, petitioner has invoked the jurisdiction of this Court under Title 28, U. S. Code (New Federal Judicial Code), Section 1254. This respondent raises no question concerning the same.

STATEMENT OF THE CASE.

The indictment, returned February 25, 1948, charged that during the immediately preceding period of approximately ten years the defendants had continuously engaged in an unlawful conspiracy to fix uniform and non-competitive retail and wholesale prices for fluid milk sold by the corporate defendants, Pevely Dairy Company and St. Louis Dairy Company, these respondents, throughout the St. Louis Area, in restraint of trade and commerce and in violation of Section 1 of the Sherman Act, Act of July 2, 1890, c. 487, as amended, 15 U. S. C. 1 (R. 7). Such was the charge made, though during the "O. P. A. Period," that is, from April 28, 1942, to June 30, 1946, the prices which the dairies were permitted to charge for fluid milk were fixed by the Government (R. 149), and at the trial the Government abandoned its claim of price fixing during that period (R. 580).

By its original bill of particulars the Government conceded that it had no direct evidence of any conspiratorial agreement among the defendants and stated it would rely upon evidence from which, it claimed, an agreement could be implied, consisting in part of concert of action and course of conduct and in part of meetings and discussions concerning prices and price changes (R. 22). There was a supplemental bill of particulars (R. 24) and a second supplemental bill (R. 62). According to the indictment, as amplified by these bills of particulars, and omitting the O. P. A. period, the dates on which the alleged uniform

and practically simultaneous price changes charged to have been made by the corporate defendants covered (1) the period from April 8, 1938, to September 1, 1942, inclusive, it being alleged that such price changes were made on or about April 8, 1938, June 12 and August 7, 1939, and February 9 and December 1, 1940, and July 1 and September 1, 1941 (R. 62), and (2) the period from July 3, 1946, to January 27, 1948, inclusive, it being alleged that such price changes were made on or about July 3, July 9, October 4 (R. 22) (not October 14th stated in the indictment, R. 8), 1946, January 20, August 1, September 16, 1947, and January 27, 1948. The prices mentioned in the indictment (R. 8, 9) applied only to Grade A regular milk (R. 186), which did not include homogenized milk (R. 326), and consequently the alleged conspiracy relates alone to Grade A regular milk to the exclusion of all other dairy products (R. 326, 602).

The jury returned a verdict of guilty against the corporate defendants, these respondents, and acquitted all the individual defendants (R. 627, 628). Judgment of conviction was accordingly entered against each of the respondents (R. 629-631), each filed a motion for judgment of acquittal and in the alternative for a new trial (R. 631 634), which were overruled (R. 637), and each duly appealed to the United States Court of Appeals for the Eighth Circuit (R. 1, 2, 3), where, pursuant to the opinion of that court here sought to be reviewed (R. 650, 662), it was ordered and adjudged that the judgments of the District Court be reversed and the cause remanded to that court with directions to grant respondents a new trial (R. 663, 664).

The evidence shows that the fluid milk business in the St. Louis area is regulated and controlled by two governmental agencies, namely, the Department of Agriculture (R. 83) and the Health Department of the City of St.

Louis (R. 82). The Standard Milk Ordinance of the City of St. Louis embodies the statutory requirements of the United States Public Health Ordinance (R. 442, 445). The original ordinance, No. 40,939, approved December 15, 1936 (R. 32-59), remained basically unchanged during the periods here involved, though amended by Ordinance No. 41,242, approved February 23, 1938 (R. 30-32) and Ordinance No. 41,803, approved April 4, 1940, in particulars not here of consequence (R. 28-30). It prescribes minimum butter content and maximum bacterial count, and provides for the inspection of milk when received at the plant of the handler and for the inspection of the farm of the producer and the approval of the farm buildings and equipment on each dairy farm no matter where located. Under this ordinance fluid milk cannot be sold in the City of St. Louis unless it has been approved by the Health Commissioner of the City or unless it has been imported from some controlled milk shed where similar inspection has been made (R. 157, 158). And because of this ordinance Grade A milk became and is a standardized product; there is no appreciable difference between the Grade A milk of one dairy and that of another (R. 445). During all the period covered by the indictment the price to be paid to producers by all handlers for raw milk was determined pursuant to the Government's orders and regulations authorized by the Agricultural Marketing Agreement Act of 1937, under which the Secretary of Agriculture issued Order No. 3 (R. 85-95) as amended (R. 97-99), which was introduced by the Government as its Exhibit No. 4 (R. 83), establishing the basic formula by which the local Federal Milk Market Administrator determines the prices to be paid producers for milk. He announces monthly the prices to be paid by the handlers to the producers for Class I milk, including Grade A regular milk here involved, and Class II milk, including but-

ter, cream, skimmed milk and other dairy products. The prices actually paid the producer are "blended" prices made up of a combination of Class I and Class II prices, and dependent upon the character of the utilization made by the handler of such milk (R. 100, 142, 149).

At or about the time of the enactment of the Standard Milk Ordinance of the City of St. Louis there were approximately 9900 producers in the St. Louis milk shed, but by 1947 the number of producers had decreased to about 3300 (R. 152). The evidence for the Government showed that the supply of milk in the St. Louis area constantly became shorter and shorter (R. 235), making it necessary for the companies to import milk from Chicago, purchased from other handlers, for which they were required to pay a premium which increased during the scarce period when pastures were drying up (R. 141). The Government's evidence showed that during nearly all the period covered by the indictment there was an upward trend in the prices that handlers were required to pay producers; that the Class I price per quart (that is the average price paid by the dairies to the producers) increased from .0666 in January, 1942, to .1190 by December, 1947 (R. 134-137); that the premium required to be paid producers had gone up constantly for the ten years covered by the indictment (R. 141); and that the price required to be paid for labor is fixed by union contract and was increased from time to time (R. 236); and that these were the major cost factors (R. 236, 260) and were identical for both corporate defendants (R. 260).

In support of the charge in the indictment, as amplified by the original bill of particulars (R. 22, 23) and the supplemental bill (R. 24, 25), that the Government would rely in part upon the meetings and discussions between an employee of St. Louis Dairy Company and an employee of Pevely Dairy Company, the Government called two wit-

nesses, Julian Gee, an employee of St. Louis Dairy Company, and J. J. Wasser, an employee of Pevely Dairy Company. They testified to several meetings they had prior to October 1, 1941. Upon each such occasion one of these witnesses would have with him a list of increased prices that his company had decided to put into effect (R. 228, 231, 249) and would give the other a list of such prices. Both of these witnesses denied that there was ever any agreement or understanding between them as to a price change or a price increase (R. 229, 256). No such exchange of information was had after October 1, 1941 (R. 230, 254). The Government's evidence shows that neither of these witnesses had any authority to make for his company any agreement fixing prices (R. 229, 230, 231, 234, 252).

Mr. Wasser, as the Government's witness, testified that it was the practice of Pevely Dairy Company to have at each Board Meeting a report from the auditing department showing how the company was progressing on the sale of fluid milk; whether it was profitable or was going at a loss; and that there was always an economic reason for every change in price (R. 232). And the testimony of Mr. Gee, as the Government's witness, showed that whenever an increase was ordered in the price of production, or labor costs were increased under a new union contract, there would be a conference with Mr. Lide, president of St. Louis Dairy Company, Mr. Versen, vice-president, and Mr. Gee and Mr. Reinhardt, the comptroller, at which time Mr. Lide would call for the report of the comptroller as to costs, and the situation would be thoroughly considered (R. 236); the final decision resting with Mr. Lide (R. 234). And Mr. Gee said that every price change made by St. Louis Dairy prior to October 1, 1941, was made as the result of some drastic change in costs, either of labor or payments to the producers for milk (R. 249).

As to the price changes made by each of the companies during the second period mentioned above, that is from July, 1946, to January, 1948, inclusive, two were made in July, 1946, one in October, 1946, and the others in January, August and September, 1947, and January, 1948. That of January, 1947, which became effective for both companies on January 20 of that year, was a decrease in price, resulting from a decrease in price that the companies were required to pay producers for raw milk (R. 136, 262, 318). The other six changes during said period were increases. The Government's witness Mr. Gee testified that they were all justified by increased costs (R. 260). That such price increases were necessitated by increased costs was shown in detail by the testimony of Mr. Versen, vice-president of St. Louis Dairy Company (R. 308, 313, 317-320), and by defendant Pevely Dairy Company, particularly by its Exhibit I (R. 495), a tabulation or calculation by Mr. Nagel, Comptroller of the Company, of the increase or decrease in the operating expense per average quart of fluid milk sold by Pevely Dairy Company at retail and wholesale, compared to the selling price per unit quart (R. 496). From the item of administrative expense per unit quart appearing in that exhibit, all compensation of every character received by the Kerckhoff brothers from the corporation was eliminated (R. 499).

Mr. Nagel's testimony shows that many years prior to the ten-year period here involved he inaugurated for Pevely Dairy Company a cost accounting system that has ever since been employed, by the use of which the company's books show each month the cost of each unit item sold during that month, including raw material, plant expense, labor, delivery costs, overhead and all other cost factors, and the unit selling price, and that consequently the Company's books showed the total cost of a quart of Grade A milk delivered, at either wholesale or retail, and

the cost of all fluid milk, delivered in any sized container, and the resulting profit or loss during any period (R. 486, 489). Mr. Nagel testified that such method of allocating cost is the method established by the International Association of Milk Dealers set forth in a manual published in 1923 (R. 487). He had for years been a member of the Accounting Advisory Committee supplied by the industry to said association. By his testimony and said Exhibit I (R. 495) it was shown that the net increase in Pevely Dairy Company's cost of purchasing, processing and delivering an average quart of fluid milk from June, 1946, to January, 1948, was 6.61 cents—after eliminating all compensation paid to the five Kerckhoff brothers; and that the net increase in the selling price per unit quart during the same period was 6.5 cents (R. 495, 496, 499). Mr. Nagel's further testimony was that there was less profit on Grade A regular milk than on average fluid milk (R. 494), and that he believed that considering fluid milk as a whole presented a truer picture because it included the sale of milk carrying a higher profit (R. 494).

The cost records of Pevely Dairy Company were examined by Mr. Webber, a certified public accountant employed by Ernst & Ernst, a nationally known firm of certified public accountants. He said that the general accounting and cost records of Pevely Dairy Company constituted the most complete accounting system he had ever found in any organization (R. 504). From the cost records Mr. Webber made certain tabulations, marked Pevely Dairy Company's Exhibits J, K, L and M (R. 505, 513, 521, 525), introduced in evidence (R. 565), and concerning which Mr. Weber testified. Exhibit K (R. 513) shows the quart equivalents (that is, in quarts or other sized containers) sold by Pevely Dairy Company in all fluid milk operations for each month of the period of nineteen months ending January 31, 1948, showing the net

sales, cost of the product and various forms of other expense involved. The last column of that exhibit shows that for said period of nineteen months the company sold 79,086,783 quart equivalents of fluid milk, and that the profit, before provision for Federal and State income taxes (R. 519), amounted to .00401.

Judson P. Mason, Director of Dairy Marketing for the Illinois Agricultural Association and formerly statistician for the Federal Market Administrator in St. Louis, testified that Grade A milk is generally considered a standard product in a market where there is in effect the United States Public Health Ordinance (R. 445); that under conditions prevailing in the dairy business in the City of St. Louis, where there is a large number of customers and a small number of handlers, where the cost of raw material is identical to all handlers, the cost of labor practically identical for all handlers, and other costs run very similar, such factors tend to stabilize price levels (R. 446).

And Father Leo Brown, Professor of Economics at St. Louis University, testified that where as in the Grade A milk market in St. Louis there is a highly standardized product, the product of one dealer being the same as that of another, the economic fortunes of all the sellers are interdependent, and the economic fortunes of the two larger sellers are notably interdependent; that one large seller cannot long sell at a price higher than a price at which his competitors sell; that if he were to do that he would lose his customers and cause considerable customer dissatisfaction among those who remained (R. 455); that a highly standardized product is governed largely by price, and customers would follow the lower price (R. 456); that in such a market as he described he would expect practical uniformity of price without exception and practically simultaneous change in prices (R. 457).

Concerning the seven price changes during the second period mentioned above, that is, from July, 1946, to January, 1948, inclusive, the Government introduced United States Exhibits 11 to 25, inclusive (R. 184, 185, 186), which appear in the record on pages 187 to 220, inclusive. Each such exhibit is a price announcement by one of the corporate defendants of changes in its retail and wholesale prices, not only of Grade A milk but of many other dairy products, during said period. As shown above, all of said seven changes were increases except that which became effective on January 20, 1947. A stipulation was read in evidence showing when copy for each such price announcement made by St. Louis Dairy Company was received from it by its printer and the date on which each such price change was to become effective, and showing when copy for each such price announcement made by Pevely Dairy Company was received from it by its printer, when the printed announcements were delivered by the printer to Pevely Dairy Company, and the date on which each such price change was to become effective. The stipulation will be further noticed in the argument to follow.

And the Government's evidence shows that when the company initiating a price change issued its price announcements and the same were being delivered to its customers, the other company very quickly learned thereof, usually through such price announcements falling into the hands of its drivers or other employees (R. 238).

SUMMARY OF THE ARGUMENT.

I.

The Court of Appeals was quite right in holding that the evidence adduced was legally insufficient to sustain a conviction of respondents on the charge that they had engaged in a conspiracy to fix uniform and non-competitive prices of Grade A fluid milk sold and distributed by them throughout the St. Louis area. The Government concededly had no direct evidence of the conspiratorial agreement charged (R. 22). Its case rests entirely upon circumstantial evidence. Such circumstantial evidence, however, was wholly insufficient to support a conviction, for the following reasons:

(1)

While a jury is entitled to draw all reasonable inferences from the circumstances in proof, an appellate court is authorized to determine, and charged with the responsibility of determining, the reasonableness of such inferences. To sustain a conviction where the evidence relied upon is purely circumstantial, the evidence must not only be consistent with the guilt of the accused but must be such as to preclude every reasonable hypothesis of the defendant's innocence. Where all the evidence relied upon to support a conviction is as consistent with innocence as with guilt it is the duty of an appellate court to reverse a conviction.

United States v. Litberg (7 Cir.), 175 F. 2d 20;
Wesson v. United States (8 Cir.), 172 F. 2d 931;
United States v. Gasomiser Corp. (D. C. Del.), 7 Federal Rules Decisions 712;
Cartello v. United States (8 Cir.), 93 F. 2d 412;

Isbell v. United States (8 Cir.), 227 F. 788, 792, 793;
Union Pacific Coal Co. v. United States (8 Cir.), 173 F. 737, 740;
Neal v. United States (8 Cir.), 102 F. 2d 643, 648;
Yoffe v. United States (1 Cir.), 153 F. 2d 570;
United States v. Silva (2 Cir.), 131 F. 2d 247, 249;
United States v. Laffman (3 Cir.), 152 F. 393, 394;
United States v. Tatcher (3 Cir.), 131 F. 2d 1002, 1003;
United States v. Russo (3 Cir.), 123 F. 2d 420, 423;
Nicola v. United States (3 Cir.), 72 F. 2d 780, 786;
Paddock v. United States (9 Cir.), 79 F. 2d 872;
Blumenthal v. United States (9 Cir.), 158 F. 2d 762, 763;
Scott v. United States (10 Cir.), 145 F. 2d 405, 408;
Estep v. United States (10 Cir.), 140 F. 2d 40, 45;
Hammond v. United States, 75 U. S. App. D. C. 397, 127 F. 2d 752.

(a)

The well-settled rule that where all the evidence relied upon to support a conviction is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction if not inconsistent with the general principle invoked by petitioner that the verdict of a jury in a criminal case will be sustained if there is substantial evidence to support it.

Yoffe v. United States, 153 F. 2d 570, 572, 573.

(2)

The testimony of the Government's chief witnesses, Wasser (R. 227-233) and Gee (R. 233-240, 246-264), as to meetings between them on certain occasions prior to October 1, 1941, constitutes no proof of a conspiratorial agreement between these two corporate appellants to fix

the price of fluid milk for the reason that, not only had neither of them any authority to make any agreement as to prices, but both of them positively denied that there was ever any sort of agreement or understanding between them with respect to fixing prices. Being the Government's own witnesses, and having positively denied that they participated in any sort of a conspiratorial agreement, no inference of the making of a conspiratorial agreement by or through them could be drawn from their testimony.

Cartello v. United States (8 Cir.), 93 F. 2d 412;
Jacobson v. Hahn (2 Cir.), 88 F. 2d 433;
Wiget v. Becker (8 Cir.), 84 F. 2d 706;
Gold v. United States (8 Cir.), 36 F. 2d 16, 32, 33;
Yellow Cab Co. v. Rodgers (3 Cir.), 61 F. 2d 729.

(a)

The Court of Appeals was quite right in holding that inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses (R. 659, 660); which statement was made in refutation of the contention that despite the undisputed testimony of the Government's own witnesses, Gee and Wasser, that they participated in no conspiratorial agreement, it could be inferred that they did that very thing. Such an inference would manifestly have nothing upon which to rest but mere conjecture, surmise and speculation, obviously insufficient to support a conviction.

Jacobson v. Hahn (2 Cir.), 88 F. 2d 433;
Cartello v. United States (8 Cir.), 93 F. 2d 412;
Winn v. Consolidated Coach Corporation (6 Cir.), 65 F. 2d 256, certiorari denied 291 U. S. 688, 78 L. Ed. 1059.

(3)

Whereas, as here, the Government must rely alone on circumstantial evidence to sustain the charge of a conspiratorial price fixing agreement, and the circumstantial evidence consists merely of proof of uniform price changes effective on or near the same day, in the sale of a standardized product in a highly competitive market, coupled with proof of uniformity of major cost factors, uniform cost increases, plus undisputed proof that every increase in price shown resulted from economic necessity and that the financial ruin of respondents would have resulted if such price increases had not been made, and that such uniformity in price resulted not from any agreement or attempt to maintain prices at fixed levels but from the prompt meeting by one of these companies of changes in prices by its major competitor, no case is made for the reason that the circumstances so shown are entirely consistent throughout with the defendants' innocence. The holding of the Court of Appeals to this effect is fully sustained by the authorities.

Cement Manufacturing Protective Ass'n v. United States, 268 U. S. 588, 605, 69 L. Ed. 1104, 1111;

United States v. Standard Oil Co. (8 Cir.), 47 F. 2d 288, 316, 317;

United States v. International Harvester Co., 274 U. S. 693, 708, 709, 71 L. Ed. 1302;

United States v. Sugar Institute (D. C. N. Y.), 15 F. Supp. 817, 887.

(a)

Under such circumstances uniformity of basic price in any given area is to be expected under a regime of free competition.

United States v. Sugar Institute (D. C. N. Y.), 15 F. Supp. 817, 887.

II.

It is the rule of decision of this Court that a writ of certiorari will not issue merely to review the evidence in a case or the inferences to be drawn therefrom.

General Talking Pictures v. Western Electric Co., 304 U. S. 175, 82 L. Ed. 1273, 1275;

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 68 L. Ed. 413;

United States v. Johnston, 268 U. S. 220, 227, 69 L. Ed. 925, 926.

III.

The charge in petitioner's petition (pp. 16 to 18) that the Court of Appeals was influenced by "misconceptions of law" (1) as to the effect of the acquittal of the individual defendants and (2) as to the effect of the statute of limitations, is totally lacking in substance.

IV.

The Court of Appeals properly condemned as prejudicial error the injection into the case below of the evidence as to the compensation of the Kerckhoff defendants.

Union Electric Light & Power Co. v. Snyder Estate, 65 F. 2d 297, 303;

O'Hara v. Lamb Construction Co. (Mo. App.), 197 S. W. 163, 165.

ARGUMENT.

I.

The evidence relied upon by the Government, being all circumstantial and all consistent with innocence, is insufficient to support a conviction.

(1)

In holding that the circumstantial evidence adduced was insufficient to support a conviction, the Court of Appeals correctly stated and applied the settled law as declared by the Federal Courts with respect to the scope of review of a jury's verdict of guilty in a criminal case.

Logically, we think, the first thing to be considered is the broad charge made in petitioner's petition for the writ (p. 12) that "the decision below is in conflict both with the decisions of this Court and those of almost every other circuit with respect to the scope of review of a jury's verdict of guilty in a criminal case." This assertion we stoutly deny.

This attack upon the opinion of the Court of Appeals is based upon the proposition put forth by petitioner in its petition (p. 12) that "the verdict of a jury in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." That is nothing more than the statement of a broad general principle which the Court of Appeals in no way violated. In a case of this character, resting solely upon circumstantial evidence, what will constitute **substantial evidence** sufficient to sustain a conviction requires the consideration and application of the "**circumstantial evidence rule**" that has long been recognized and enforced

in the Federal courts and in many other courts as well. This rule is that, where the evidence relied upon is purely circumstantial, to sustain a conviction it is necessary that the circumstances shown in evidence be such as to exclude every reasonable hypothesis but that of guilt. It follows that where, as here, all the evidence relied upon to support a conviction is circumstantial in its nature and all thereof is entirely consistent with the innocence of the accused, it is insufficient to support a conviction. Among the many Federal cases so holding are the following: United States v. Litberg, 7 Cir., 175 F. 2d 20; Wesson v. United States, 8 Cir., 172 F. 2d 931; Cartello v. United States, 8 Cir., 93 F. 2d 412; Isbell v. United States, 8 Cir., 227 F. 788, 792, 793; Union Pacific Coal Co. v. United States, 8 Cir., 173 F. 737, 740; Neal v. United States, 8 Cir., 102 F. 2d 643, 648; United States v. Laffman, 3 Cir., 152 F. 393, 394; United States v. Tatcher, 3 Cir., 131 F. 2d 1002, 1003; United States v. Russo, 3 Cir., 123 F. 2d 420, 423; United States v. Silva, 2 Cir., 131 F. 2d 247, 249; Nicola v. United States, 3 Cir., 72 F. 2d 780, 786; Donovan v. United States, 3 Cir., 54 F. 2d 193, 195; Graceffo v. United States, 3 Cir., 46 F. 2d 852, 853; Paddock v. United States, 9 Cir., 79 F. 2d 872; Blumenthal v. United States, 9 Cir., 158 F. 2d 762, 763; Scott v. United States, 10 Cir., 145 F. 2d 405, 408; Estep v. United States, 10 Cir., 140 F. 2d 40, 45; Leslie v. United States, 43 F. 2d 288, 289, 290; Hammond v. United States, 75 U. S. App. D. C. 397, 127 F. 2d 752; United States v. Gasomiser Corp. (D. C. Del.), 7 F. R. D. 712.

In the first case cited above, **United States v. Litberg**, 7 Cir., 175 F. 2d 20, the Court of Appeals for the Seventh Circuit, in an excellent opinion by Judge Major, concurred in by Judge Minton (now Mr. Justice Minton of this Court) and Judge Duffy, aptly stated the principles to be observed by an appellate court in determining whether circumstantial evidence is sufficient to support a judgment of conviction as follows:

"On the one hand we must keep in mind the oft-repeated rule that the weight and credibility to be attached to testimony of the witnesses is a matter for the trier of the facts and that we are required to take that view of the evidence most favorable to the Government. On the other hand, while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in proof, the court of review is charged with responsibility of determining the reasonableness of such inferences. In other words, an inference may not properly be relied upon in support of an essential allegation if a just inference may be drawn with equal consistency from the circumstances in proof. In United States v. Tatcher, 3 Cir., 131 F. 2d 1002, 1003, the court reversing a conviction based on inferences stated: 'To justify conviction of crime where the evidence relied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. United States v. Russo, 3 Cir., 1941, 123 F. 2d 420. As we have seen the evidence relied upon to sustain the defendant's conviction is as consistent with his innocence as with his guilt.'" (Citing United States v. Russo, 3 Cir., 123 F. 2d 420, 423; Isbell v. United States, 8 Cir., 227 F. 788, 792; Pierce v. United States, 6 Cir., 115 F. 2d 399, 400; and Hammond v. United States, 75 U. S. App. D. C. 395, 127 F. 2d 752, 753.)

The presumption with which an accused is clothed when standing before the bar of justice is not overcome by evidence, alone, that offers a reasonable hypothesis other than guilt—that is entirely consistent with innocence. That ancient presumption is fundamental in our jurisprudence. And because of that presumption, in every criminal prosecution by the Government not only is the jury required to find from the evidence that the defendant is guilty beyond

a reasonable doubt, if the case is sent to the jury, but **in order to get the case to the jury the burden is upon the Government to adduce evidence from which reasonable minds may fairly conclude guilt beyond a reasonable doubt;** and proof merely of circumstances that are consistent throughout with the innocence of the defendant does not satisfy that burden and does not warrant the submission of the case. Such evidence does not constitute **substantial evidence** such as to warrant a conviction.

The general principle invoked by petitioner in this connection, namely, that the verdict of a jury will be sustained if there is "substantial evidence" to support it, is in no wise in conflict with what we have said above. In **Yoffe v. United States**, 1 Cir., 153 F. 2d 570, cited by petitioner, the court (l. c. 572, 573) said:

> "Appellants claimed that the evidence before the trial court was insufficient to warrant submission of any of the issues to the jury. They refer to the statement which has often been quoted with approval in Federal decisions: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment of conviction.' (Citing authorities.)
>
> "The statement does not conflict with the general principle that in criminal cases the trial court may not properly direct a verdict if there is any substantial competent evidence before it to support a conviction (citing authorities), and that on a motion for a directed verdict that view of the evidence most favorable to the government and the inferences reasonably deducible therefrom must be accepted."

It follows that petitioner's criticism of the opinion of the Court of Appeals with respect to the scope of review of a jury's verdict of guilty in a criminal case is wholly unwarranted. The authorities cited by petitioner do not sustain its position in this regard.

In Glasser v. United States, 315 U. S. 60, upon which petitioner relies, nothing may be found with which the opinion of the Court of Appeals in this case is in conflict. In the Glasser case this Court (315 U. S. 80, 86 L. Ed., l. c. 704), said that "the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it" (citing United States v. Manton, 107 F. 2d 834, 839, also here relied upon by petitioner). For the reasons stated above, the opinion of the Court of Appeals in the instant case is in no wise in conflict with the ruling in the Glasser case or that in the Manton case. And as to the application of the circumstantial evidence rule, it should be noted that in the Glasser case this Court, upon affirming the conviction of the other defendants, reversed the judgment below as to Glasser because of error committed at the trial, and expressly refrained from expressing an opinion as to whether the circumstances in evidence warranted a submission of the case to the jury as against Glasser.

Further authorities cited by petitioner in this connection in the footnote, p. 12, of its petition, do not, upon analysis, serve to cast any doubt upon the soundness of the law as here declared and applied by the Court of Appeals. The Hardeman Case (C. A. D. C.), 163 F. 2d 21, is here inconsequential; and Yoffe v. United States (3 Cir.), 153 F. 2d 570 (cited also on p. 17 of the petition) from which we have quoted above, is directly contrary to petitioner's contention. In United States v. Valenti (2d Cir.), 134 F. 2d 362 (also cited on p. 15 of the petition) the Court

properly ruled that the facts and circumstances there in evidence—wholly unlike those here present—"logically lead to the inference of guilt." In United States v. Reginelli (3 Cir.), 133 F. 2d 595, where the charge was the violation of the Mann Act (18 U. S. C. A., secs. 398, 399) there was abundant evidence consistent with guilt and inconsistent with innocence. And the Court (133 F. 2d, l. c. 599), said: "In the circumstances thus shown, the trial court would not have been warranted in declaring, as a matter of law, that a lawful purpose on the part of the defendant for the transportation was as inferable from the evidence in the case as an immoral purpose." This is in plain recognition of the rule applied by the Court of Appeals in the instant case.

In Scott v. United States, 3 Cir., 145 F. 2d 405, cited twice by petitioner in its petition (pp. 12, 14), the Court definitely recognized the rule applied by the Court of Appeals in the instant case. The court held that circumstantial evidence may fully suffice to warrant a conviction, "provided the circumstances relied upon are wholly consistent with guilt and inconsistent with any other reasonable hypothesis" (citing authorities) the Court adding:

> "In arriving at its conclusions the jury may not speculate upon the guilt of the defendant, or choose between equally permissible inference of guilt or innocence" (citing authorities).

In Curley v. United States, cited in the footnote on p. 15 of the petition, the Court of Appeals for the District of Columbia, in an opinion by Judge Prettyman, to which there was a vigorous dissent, found fault with the earlier opinion of that court in Hammond v. United States, supra, 127 F. 2d 752, 753, because therein the court, quoting from Isbell v. United States, 8 Cir., 227 F. 788, 792, recognized the circumstantial evidence rule as stated and applied in

United States v. Litberg, supra, 7 Cir., 175 F. 2d 20, and in a long line of other Federal Cases. However, the auther of the majority opinion in the Curley Case (160 F. 2d, l. c. 232) said:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for a directed verdict of acquittal (motion for judgment of acquittal under the new Federal Rules), must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw **justifiable** inferences of fact, **a reasonable mind might fairly conclude guilt beyond a reasonable doubt.**" (Emphasis ours.)

Thus the court restated an old rule not inconsistent with, but necessarily embracing within its concept the true circumstantial evidence rule as stated and applied in the Litberg Case, the Isbell Case and all the other cases herein relied upon by this respondent, for, if the evidence is wholly circumstantial, and the circumstances shown are just as consistent with innocence as with guilt, how may a reasonable mind fairly conclude guilt **beyond a reasonable doubt?**

And we note that in the later case of McGuire v. United States, 171 F. 2d 136, 138, the same court stated and applied the rule quoted above from the Curley Case.

Nor is there any warrant for the statement in petitioner's petition for the writ (pp. 12, 13, 15, 16), that in the instant case the Court of Appeals, in setting aside the verdicts below, rejected the jury's theory of the case and accepted another theory on the ground that it seemed more credible, weighed the evidence, and by such means invaded the province of the jury. Nowhere in the opinion of the Court of Appeals may any justification be found for

this attack upon the opinion. On the contrary, the Court of Appeals properly applied the well established rule that had theretofore been reiterated and applied by the same court and by other Federal courts in a long line of cases, some of which are cited above, namely, that where circumstantial evidence alone is relied upon to support a conviction, such evidence, in order to constitute substantial evidence warranting a conviction, must not only be consistent with the defendant's guilt but inconsistent with his innocence; must be such as to exclude every reasonable hypothesis but that of guilt (R. 660, 661).

(2)

The testimony of the Government's witnesses, Wasser and Gee, as to meetings between them prior to October 1, 1941, does not support a conviction.

In petitioner's petition (pp. 9, 10, 14, 15) reference is made to the testimony of the Government's witness Wasser, sales manager for Pevely Dairy Company (R. 227-233), and its witness Gee, salesmanager for St. Louis Dairy Company (R. 233-240, 246-264), as to meetings between them on certain occasions prior to October 1, 1941. Such testimony, we submit, not only constitutes no evidence of a conspiratorial agreement between the corporate defendants, these respondents, but on the contrary negatives the existence of such an agreement. Their testimony showed that they met on several occasions during the period from August 7, 1939, to August 28, 1941, and upon such occasions one would furnish the other with a list of prices showing price changes that the former's company had already determined upon, and the future date upon which the new prices were to become effective (R. 227-234, 248-250). Mr. Wasser testified that during the period mentioned he had upon certain occasions informed Mr. Gee of what Pevely Dairy Company's "prices were to be

after the company had decided to raise the price" (R. 227, 228). He definitely denied, however, that he was ever assured that St. Louis Dairy Company would put such price changes into effect (R. 228, 229). And Mr. Gee testified:

> "Q. Now, Mr. Gee, in connection with any of these price changes, as salesmanager for the St. Louis Dairy Company, did you ever agree with Mr. Wasser or any competitor to have a price change or price increase? A. I most certainly did not.
>
> Q. Never in your life? A. Never" (R. 256).

Now the Government's theory, upon which it has proceeded throughout this case, namely, that despite the positive testimony of these witnesses that they did not make or take part in any sort of conspiratorial agreement, constituting the only evidence as to what occurred between them, a jury may lawfully find, upon mere conjecture, speculation and surmise, that they were not telling the truth, but did in fact enter into agreements to fix the price of Grade A fluid milk, is, we submit, utterly fallacious. Such theory is contrary to both reason and authority. **Cartello v. United States**, 8 Cir., 93 F. 2d 412; **Jacobson v. Hahn**, 2 Cir., 88 F. 2d 433; **Wiget v. Becker**, 8 Cir., 84 F. 2d 706; **Gold v. United States**, 8 Cir., 36 F. 2d 16, 32, 33; **Yellow Cab Co. v. Rodgers**, 3 Cir., 61 F. 2d 729.

In **Cartello v. United States**, supra (93 F. 2d 412), the defendants, election officials, were charged with having conspired to injure citizens in the free exercise or enjoyment of the rights and privileges secured to them by the Constitution and laws of the United States, through the alteration of ballots at a general election. The evidence adduced by the Government, consisting of the testimony of two witnesses, went to show that the defendants were not guilty of the offense charged. In holding that the

evidence was insufficient to support a conviction, the Court said:

> "It is argued that these ballots could have been erased in the very presence of the government witnesses, Lemon and Lynch, without their knowledge, but the evidence is to the contrary and convictions cannot be sustained on mere possibilities. Had these witnesses, with personal knowledge, not been placed upon the witness stand by the government, there might have been some room for suspicion or surmise that this had been done, **but the government has itself proven that although the ballots were altered, they were not altered by either of the defendants at this polling place.** Ordinarily, a litigant is bound by the testimony of his own witnesses, **especially if that testimony is uncontradicted and there is no claim of mistake.**" (Emphasis ours.)

In **Jacobson v. Hahn**, 88 F. 2d 433, the Court of Appeals for the Second Circuit applied the same rule in a civil case. That was a suit in equity by Jacobson against Hahn as Clerk of the District Court for the Northern District of New York and others, one defendant being the Collector of Internal Revenue, to recover certain bonds that had been deposited by plaintiff with the clerk as bail for one Flegenheimer who had been charged with a criminal offense but had been acquitted and to declare invalid a lien that the collector had filed for taxes. The testimony of the witnesses called by defendants, as well as that of plaintiff's witnesses, established that the bonds were not the property of Flegenheimer; that the money that went to purchase them belonged entirely to others and was not loaned to Flegenheimer. The Court (88 F. 2d, l. c. 435) said:

> "Having called these witnesses to whose testimony we have referred, the defendants may not now suc-

cessfully question their statements and ask us to reject them as untruthful or unworthy of belief upon mere suspicion that the money was loaned to Flegenheimer. Carlyle v. Norris, 215 N. Y. 400, 109 N. E. 564, Ann. Cas. 1917A, 429; Pollock v. Pollock, 71 N. Y. 137. The testimony is not inherently improbable nor is it contradicted by evidence, and the collector having presented it is bound by it. Postene & Co. v. Irving Nat'l Bank, 249 N. Y. 272, 164 N. E. 499; Arnall Mills v. Smallwood, 65 F. 2d 57 (C. C. A. 5).

"We are therefore obliged to hold the finding below that part of the money was Flegenheimer's is without evidence to support it. Since the fact is sufficiently established that Flegenheimer obtained the $75,000.00 used to purchase the bonds for bail purposes only the Court below was not at liberty to draw contrary inferences and place total ownership in Flegenheimer upon mere conjecture or unwillingness to believe the witnesses called by the defendants. Winn v. Consolidated Coach Corp. (C. C. A.), 65 F. 2d 256, certiorari denied 291 U. S. 668, 54 S. Ct. 543, 78 L. Ed. 1059. Mere suspicion, conjecture or surmise is insufficient. See Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 344, 53 S. Ct. 391, 395, 77 L. Ed. 819."

In **P. Pastene & Co. v. Irving National Bank**, 249 N. Y. 272, 164 N. E. 49, cited in Jacobson v. Hahn from which we have just quoted, wherein the opinion was written by Judge O'Brien and concurred in by Judge Cordozo, later Mr. Justice Cordozo of this Court, and Judges Pound, Crane, Andrews and Kellogg, the Court held that where evidence produced by the plaintiff tending to show that he had no right of recovery, which was not "inherently improbable or materially contradicted by other evidence" was binding upon the plaintiff, citing Carlyle v. Norris (cited in Jacobson v. Hahn, supra), 215 N. Y. 400, 109 N. E. 564, Ann. Cas. 1917A, 429.

The Court of Appeals, indeed, was quite right when it said in its opinion: "Inferences which are contrary to established facts may not be drawn from mere conjecture and an unwillingness to believe the unimpeached and uncontradicted testimony of witnesses." This is obviously sound law. Certainly, facts may be taken as "established" when shown by unimpeached and uncontradicted testimony from the lips of the Government's own witnesses, **constituting the only testimony on the subject.** It here serves no useful purpose for petitioner to discourse upon the right of a jury to believe or disbelieve witnesses. If other testimony had been adduced contrary to that of Wasser and Gee, quite another situation would have been presented. But since their testimony was the only testimony on the subject, and stood wholly uncontradicted and unimpeached, neither the court nor the jury could utterly disregard that testimony and find upon mere surmise, conjecture or suspicion that these witnesses did something they said they did not do. This rule has been applied both where the unimpeached and uncontradicted testimony in question was that adduced by the Government (Cartello v. United States, supra, 8 Cir., 93 F. 2d 412) and where the unimpeached and uncontradicted testimony was that adduced by defendants (Jacobson v. Hahn, supra, 2 Cir., 88 F. 2d 433; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 340, 341, 77 L. Ed. 819, 822, 823).

In the Chamberlain case just cited this Court said:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony from unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts sought to be inferred did not exist."

A long line of decisions, Federal and State, are cited in support thereof.

In this connection petitioner in its petition (pp. 9, 10) quotes that portion of the District Court's opinion on motions for judgment of acquittal in this case (79 F. Supp. 12, 17, 18), wherein the court said that one would be naive to conclude that at one of these conferences the agent initiating the conference did so solely to tell his competitor's agent, "We are going to raise our prices on Grade A milk one and one-half cents commencing thirty-six hours hence. Goodbye." In this the District Judge plainly erred. Such remark constituted a holding to the effect that the jury could find, **upon mere conjecture, surmise or suspicion,** that these witnesses had discussions as to prices which they said they did not have, **and which is utterly and wholly unsupported by any other evidence of any character in the record.** And not only this, but the District Judge's further statement to the effect that a message such as he mentioned could have been transmitted by telephone, shows that the learned Judge failed to hold in mind the evidence regarding that matter. The record shows the prices in question did not relate to that of Grade A regular milk alone, but to retail and wholesale prices of quite a long list of other products, such as are shown by the price announcements introduced as Defendants' Exhibits (relating to a later period) appearing on pages 187 to 220, inclusive, of the record. The communication in question merely consisted of the giving by one of these witnesses to another a list of prices **that the former's company had already determined to put into effect** and was taking steps to put into effect (R. 231, 249).

Nor is this all. The testimony of both of these Government witnesses not only shows that the price changes that came about during this period were not made by virtue of any sort of an agreement between the corporate defend-

ants, but shows that they came about because of economic necessity (R. 232, 235, 236, 249), and were not put into effect by either corporate defendant until those authoritatively in charge of its affairs had thoroughly canvassed the situation and found that such increased prices were a necessity (R. 232, 235, 236).

And in addition to all this is the further fact that this record shows without contradiction or dispute that neither of these men had any authority whatsoever to fix prices or make any sort of an agreement with anyone for the fixing of prices for or on behalf of the corporate defendant he represented (R. 229, 230, 231). Just how the corporate defendants could be held criminally liable because of the acts of agents having no authority to make for them any sort of a conspiratorial agreement, the Government has never, throughout this entire case, undertaken to show.

In its petition (p. 11) petitioner says:

> "A meeting at which A says, 'I am going to raise my price 10 cents next week,' and B says, 'I will, too,' has the same consequence—economical and legal—as one in which A and B expressly agree on a price to be charged."

The record affords no justification for such argument. According to the undisputed testimony of these Government witnesses, when one would give the other a price announcement or list of prices it would be with a statement that his company had ordered that the increased prices be put into effect; and on no occasion did the other party to the conference ever say that his company would do likewise. **There was never any "I will too"** (R. 229, 256). Nor, according to the testimony of these two witnesses, did they upon any such occasions "discuss price changes to be made" as stated by petitioner in its petition (p. 9). The fact that Mr. Wasser, in informing Mr. Gee of an increase

in price determined upon by Pevely Dairy Company, hoped that Mr. Gee's company would increase its price, too (R. 229), certainly has no tendency to show any conspiratorial agreement. On the contrary, the very fact that Mr. Wasser could only **hope** that the competitor would increase its price negatives the making of any conspiratorial agreement. Hope, which springs eternal in the human breast, has not as yet come under the ban of the Sherman Anti-Trust Act.

(3)

In view of the evidence as a whole and the stipulated facts, proof of uniform price changes made effective by respondents on or near the same date did not constitute circumstantial evidence such as to support a conviction.

Since the Government relied alone upon circumstantial evidence to sustain the charge made against the corporate defendants, these respondents, of a conspiratorial agreement fixing the sale price of Grade A regular milk, and such circumstantial evidence consisted merely of proof of uniform price changes which became effective on or near the same day, and testimony of the Government's witnesses, the stipulated facts, as well as undisputed evidence adduced by the defendants, showed that the product was a standardized product vended in a highly competitive market, with proof of uniformity of major cost factors, uniform increases from time to time in such cost factors, that every increase in price resulted from economic necessity, and that such uniformity in price resulted not from any agreement or attempt to maintain prices at fixed levels but from the prompt meeting by one of these companies of changes in price theretofore put into effect by its major competitor, no case was made for the jury for the reason that the circumstances so relied upon by the Government were entirely consistent throughout with the defendants' innocence.

As appears from our statement, supra, the record shows that because of the Standard Milk Ordinance Grade A milk is a thoroughly standardized product. There is no appreciable difference between the Grade A milk of one dairy and that of another (R. 445). It appeared in the Government's case that during all the period covered by the indictment prices to be paid from time to time to producers by all handlers in the St. Louis area for raw milk were the same, the price being regulated by Order No. 3 of the Secretary of Agriculture (R. 84, 85-95, 97-99). It further appeared that the principal labor costs for both respondents were the same, being fixed by contracts between the handlers and the union (R. 236), which were identical for all handlers and thus, in effect, industry-wide contracts (R. 330, 457). And it appeared in the Government's case that the cost of the raw product and the labor costs were the two major cost items for both companies (R. 236). Naturally the cost of equipment, gasoline, bottles and materials generally were bound to be substantially the same for both companies per quart of Grade A milk. And the Government's witness, Mr. Gee, said that the cost price for both companies on the major portion of costs would be the same; that there isn't much margin for a difference between them (R. 260).

It appears beyond dispute that these respondents, the two large dairies in the City of St. Louis, were selling a standarized product in a highly competitive market with uniform basic costs. The testimony of Judson P. Mason, Director of Dairy Marketing with the Illinois Agricultural Association and formerly statistician for the Federal Market Administrator in St. Louis, is shown in our statement, supra, and was referred to by the Court of Appeals in its opinion (R. 657). He testified not only that Grade A milk is a highly standardized product, but where, as here, the cost factors are basically identical for all handlers and other costs very similar, such factors tend to

stabilize price levels (R. 446). And Dr. Leo Brown, Professor of Economics at St. Louis University, whose testimony is shown in our statement, supra, and referred to in the opinion of the Court of Appeals (R. 657, 178 F. 2d, l. c. 368), testified that under conditions such as are present in the milk industry in St. Louis, the product of one dealer being the same of another, the economic fortunes of all the sellers are interdependent, **and the economic fortunes of the two large sellers are notably interdependent; that one cannot long sell at a price higher than that of his competitors** (R. 445); **that in such a market he would expect practical uniformity of price with slight exceptions and practically simultaneous change in price** (R. 457).

The testimony of these expert witnesses serves to shed much light upon the conditions prevailing on the Grade A milk market in the City of St. Louis during the period here involved. It is true that this testimony came from the lips of defense witnesses. However, not only does it stand wholly unrefuted and undisputed, but it merely shows in greater detail the fundamental features of the case as shown by the Government's own evidence. Indeed, we submit, the Government's own evidence and the **stipulated facts** to which we shall presently refer, conclusively show that every fact and circumstance in this case from which the Government has sought to have an inference of guilt drawn is thoroughly consistent with the innocence of these respondents; though we think it cannot be doubted that where, as here, the evidence relied upon for a conviction is purely circumstantial, the court, in ruling a motion for a judgment of acquittal at the close of all the evidence, is authorized to look if need be to the defense evidence in determining whether the inferences to be drawn from the facts and circumstances shown in proof by the Government offer a reasonable hypothesis other than guilt. United States v. Gasomiser Corporation (D. C. Del.), 7

F. R. D. 712, 720, 721, 722. And it may be here noted that the testimony of these experts accords exactly with the brief statement of Mr. Wasser on the stand as the Government's witness **that it was impossible for Pevely Dairy Company to get a higher price than its competitor** (R. 229). Indeed, the evidence both for the Government and the defense irrefutably shows that, **in view of the circumstances and conditions under which these two dairies are forced to operate, uniformity of price will naturally and inevitably come about** despite the fact, as shown by the Government's own evidence, that there is between these two companies very keen competition and rivalry in the matter of obtaining and retaining wholesale and retail customers (R. 257), as well as in the matter of obtaining a supply of raw milk from producers (R. 180), of which there has been a shortage in this area for many years (R. 143).

The Court of Appeals was quite right in holding in its opinion:

> "The milk as handled by appellants was a standardized product. Its cost items being substantially identical for both appellants, uniformity in price would result from economic forces (R. 657, 178 F. 2d, l. c. 368).
>
> * * * * * * *
>
> "We are clear that mere uniformity of price in the sale of a standardized commodity such as milk is not in itself evidence of the violation of the Sherman Anti-Trust Act" (R. 659, 178 F. 2d, l. c. 369).

In this connection the court not only referred to the testimony of the expert witnesses mentioned above but quoted from a recent treatise by Edward H. Chamberlain, Professor of Economics at Harvard University, and from the decision of this Court in **Cement Manufacturers Protective Ass'n v. United States,** 268 U. S. 588, and the decision of the Court of Appeals for the Eighth Circuit in **United**

States v. Standard Oil Company, 47 F. 2d 288, both of which decisions are here squarely in point (R. 658, 659, 178 F. 2d, l. c. 368, 369).

The Government has laid great stress upon the uniformity of price changes during the period of nineteen months from July, 1946, to January, 1948, as shown by the price announcements of these respondents (United States Exhibits 11 to 25, inclusive, R. 187-220, introduced in evidence by the Government, R. 184-186). There were seven of these price changes during that period, all of which except that of January 20, 1947, being price increases. As shown in our statement, the Government's witness, Mr. Gee, testified that all such increases were justified by increased costs (R. 26). And this was further shown by the testimony of Mr. Versen (R. 308-313, 317-320), and shown in detail by this respondent, Pevely Dairy Company, particularly by its Exhibit I (R. 495), which had been prepared by its controller, Mr. Nagel, and by its Exhibit K (R. 513), prepared by Mr. Weber from Mr. Nagel's cost records. Exhibit I showed that during said period of nineteen months from June, 1946, to January, 1948, in which there had been six increases and one decrease in the selling price of fluid milk, a total increase of .065, the total net increase in cost per unit quart was .066 (R. 495, 500); while the last column of Exhibit K shows that for said nineteen months period the profit, before provision for Federal and State income taxes, amounted to .00401 per unit quart (R. 513). In other words, there was approximately a profit of **four mills** per unit quart during that period, while the net increase to the company of purchasing, processing and delivering a unit quart of milk had increased more than **six and one-half cents.** It is easy to see that without such increases the company could not have continued to operate.

The stipulation mentioned above shows certain conceded and highly significant facts in connection with the making

of the change which occurred in the price of Grade A milk during said period of nineteen months. That stipulation appears on pages 546 and 547 of the record. As to each such price change the stipulation shows which company initiated the change, when its copy was received by its printer for printing price announcements of such change for delivery to its customers, and when its price change was to become effective, and shows, too, when the other company sent its printer copy for printing its price announcements regarding the same price change and when it made its price change effective; and shows also when Pevely Dairy Company's printed announcements for each such price change were returned to it by its printer. The stipulation shows that Pevely Dairy Company's printer returned to it the printed announcements on the same day the printer received the copy thereof in every instance except for the price change which became effective August 1, 1947. Upon that occasion the copy was delivered by the company to the printer on July 25, 1947, and the printed announcements were returned to the company on July 29, 1947; the other facts shown by the stipulation are summarized in the following tabulation:

St. Louis Dairy Company		Pevely Dairy Company	
Date Copy Received by Printer	Date Price Change Effective	Date Copy Received by Printer	Date Price Change Effective
7/ 2/46, 4:30 P. M.	7/ 4/46	7/ 2/46	7/ 3/46
7/ 8/46, 6:30 P. M.	7/ 9/46	7/ 9/46	7/10/46
9/ 4/46, 11:00 A. M.	10/ 5/46	10/ 3/46	10/ 4/46
1/17/47, 8:30 A. M.	1/20/47	1/20/47	1/20/47
7/30/47, 5:00 A. M.	8/ 1/47	7/25/47	8/ 1/47
9/11/47, 4:00 P. M.	9/16/47	9/15/47, 9:15 A. M.	9/16/47
1/26/48, 9:00 A. M.	1/28/48	1/23/48	1/27/48

The dates appearing in bold-face type in this tabulation serve to indicate the company which initiated the particular price change.

It thus appears that **in only three instances out of the seven** (the changes effective on January 20th, August 1st and October 16th, 1947) **did the price changes of the two**

companies go into effect on the same day; and not in a single instance was there simultaneous action to bring about the price change. In each instance the company not initiating the price change had ample opportunity to learn of its competitor's action and to thereafter take steps to notify its own customers in time to put into effect its own price on the date it is shown to have become effective. In one instance, that is, when Pevely Dairy Company initiated the price change on July 25, 1947, St. Louis Dairy Company did not send its copy for its price announcements until **five days** later. In the case of the change in September, 1947, **four days** elapsed after the St. Louis Dairy Company initiated the price change and sent its copy to the printer before Pevely Dairy Company sent its copy to its printer. And **three days** were involved in the change made in January, 1948.

And the Government's own evidence conclusively shows that when the company initiating a price change issued its price announcements and they were being delivered to its customers, copies thereof very quickly fell into the hands of the drivers or other employees of its competitor showing what had occurred. The Government's witness Mr. Gee testified that **a competitor would know of a price change "no more than it was on the street"** (R. 238). And the undisputed evidence makes it clear that those operating a dairy under conditions such as are shown to have been here present must ever be alert to discover any price change by a competitor so as to be able to take prompt action as to its own price situation. A decrease in price by one company must be promptly met by the other or the latter will suffer a great decrease in the volume of its business. Customers knowing that the milk of the two dairies must necessarily be of the same high quality to be approved as Grade A milk, will not pay even a small premium for the milk of a particular dairy (R. 229, 455).

And, as shown above, the increases mentioned were invariably brought about by increased cost factors common to both companies (R. 232, 249, 260). Naturally neither company cared to be the first to initiate a price increase. As to this, the expert witness Mason said:

> "In all our experience, lots of times we know that our costs are mounting. We know we would like to raise prices, and sometimes, we are glad if somebody else does it first, and we follow suit, we know that we are on pretty safe ground because we don't have to worry about somebody taking our business. In other words, everybody is subject to the same pressure, and if somebody breaks under that pressure by raising prices, you will find normally that other handlers will come up and meet it in a tight market" (R. 444).

Obviously, when one company took the initiative and announced a price increase in order to prevent suffering more loss, its competitor would be under the same necessity for a price increase, and the latter's action in promptly adopting the new price certainly can afford no substantial evidence of a conspiratorial agreement to fix prices.

The language of this Court in its opinion in **Cement Manufacturer's Protective Association v. United States**, 268 U. S. 588, 69 L. Ed. 1104, quoted by the Court of Appeals in its opinion in the instant case (R. 658, 178 F. 2d, l. c. 369), is here directly applicable, namely:

> "• • • The fact is that any change in quotations of price to dealers promptly becomes well known in the trade through reports of salesmen, agents, and dealers of various manufacturers. It appears to be undisputed that there were frequent changes in prices and uniformity has resulted not from maintaining the prices at fixed levels but from the prompt meeting of changes in prices by competing sellers."

It follows that the conviction of these respondents does not rest upon evidence but purely upon suspicion, speculation, conjecture and surmise.

II.

And since the decision of the Court of Appeals is in no way in conflict with the decisions of this Court or of other Courts of Appeal, but states and applies the settled law as declared by this Court and the Courts of Appeal, a writ of certiorari should not issue herein. It is the settled rule of decision of this Court that the writ will not issue merely to review the evidence in a case or the inferences to be drawn therefrom. General Talking Pictures v. Western Electric Company, 304 U. S. 175, 82 L. Ed. 1273, 1275.

III.

The charge in petitioner's petition (pp. 16-18) that the Court of Appeals was influenced by misconceptions of law, (1) as to the acquittal of the individual defendants, and (2) as to the effect of the statute of limitations, calls for scant notice, if any. As to the former, the Court said:

> "It is true the question on review is not whether the verdict of acquittal of the individual defendants was warranted, but whether the verdict of guilty against the corporation is sustained by substantial evidence, and mere inconsistency in verdicts is not fatal" (R. 661, 178 F. 2d, l. c. 370, 371).

And the opinion upon its face plainly shows that the Court's decision did not rest in any degree upon the theory that anything that occurred prior to the O. P. A. period would be barred by limitations (R. 660, 661, 178 F. 2d 370).

IV.

It cannot be doubted that the Court of Appeals properly condemned as prejudicial error the injection into this case

below of evidence as to the compensation of the Kerckhoff defendants (R. 539, 540). Union Electric Light & Power Co. v. Snyder Estate, 65 F. 2d 297, 303; O'Hara v. Lamb Construction Co. (Mo. App.), 197 S. W. 163, 165. Petitioner says that this evidence was introduced merely to rebut defendants' contention that their prices were determined by economic necessity and not by concert of action and the evidence they adduced in support of such contention. But the record refutes this. Government counsel got the matter before the jury at an early stage of the trial in the redirect examination of the witness Wasser (R. 233), long before the defendants introduced any evidence, obviously for the sole purpose of injecting prejudice into the case. There never was any attempt by the Government to allocate administrative expense to the cost of Grade A milk or fluid milk as a whole. And, as shown above, in this respondent's evidence as to cost increases all compensation received by the Kerckhoff brothers from the corporation had been eliminated (R. 496, 499). And it is altogether plain that under the circumstances the injection of this matter into the case was prejudicial to the corporation as well as to the individual defendants, the owners thereof.

CONCLUSION.

For the reasons hereinabove stated, we submit that petitioner's petition for the writ should be denied, and pray that this be done.

Respectfully submitted,

WILLIAM H. ALLEN,
JAMES A. FINCH,
E. C. HARTMAN,
Attorneys for Respondent,
Pevely Dairy Company.